

(5.)

THE
C A S E
OF
WITNESSING
AGAINST
OFFENDERS
Face to Face,
Examined and Discussed.

In Answer to this QUESTION,

VIZ.

Whether it is always just and necessary in Order to the Conviction and Punishment of an Offender, upon the Statutes against Profaneness and Debauchery, that the Informant or Witness should be made known to him, or give Evidence and Testimony of his Crime, to the Magistrate, before his Face?

~~For the sake of the Reader, who may be desirous to know the Answer to this Question, I have thought fit to insert here the following Account of the Proceedings in this Case.~~

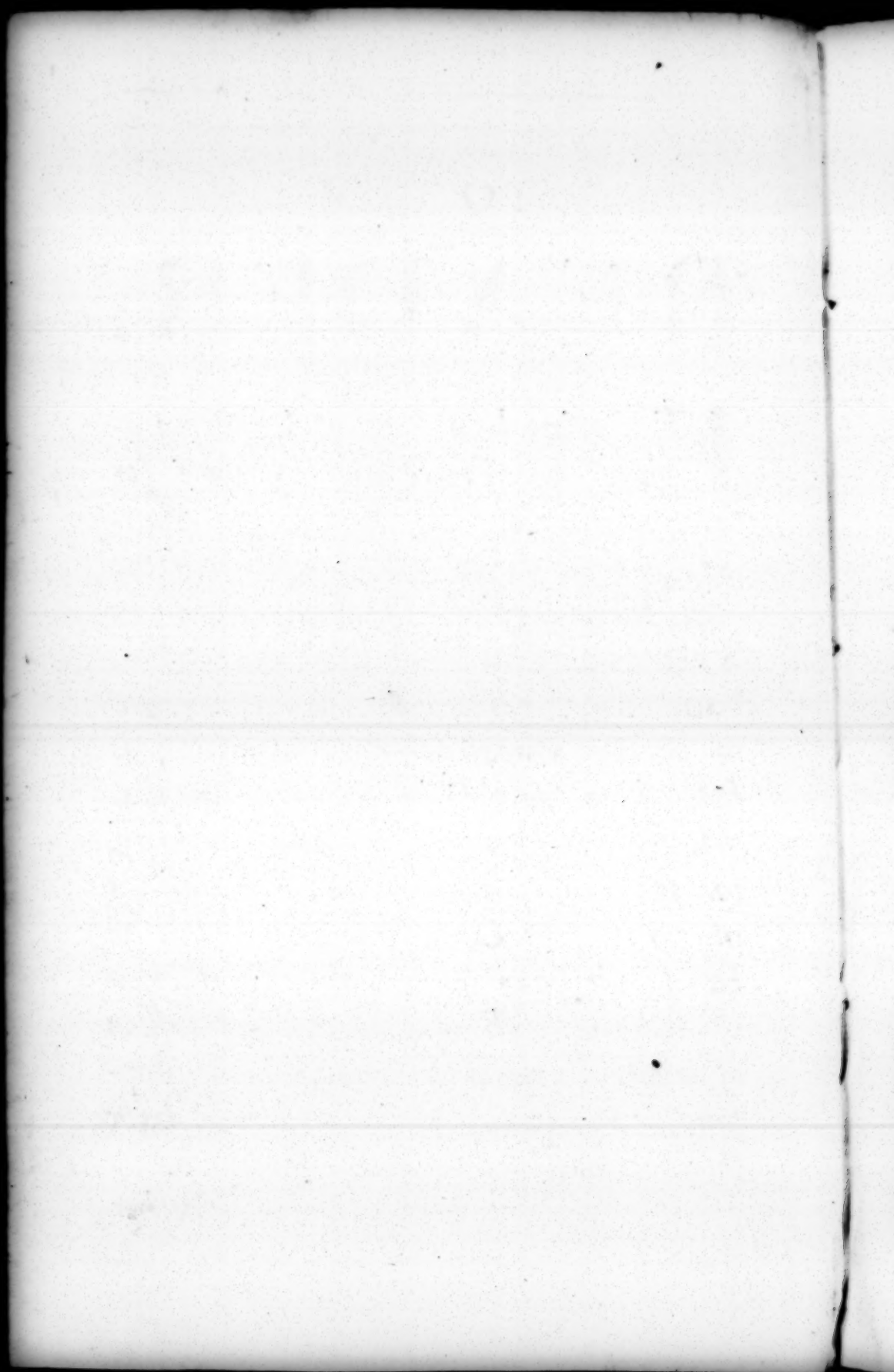
L O N D O N :

Printed for Jonathan Robinson, at the Golden Lion
in St. Paul's Church-Yard. 1704.



TO THE READER.

I*T having been a great Objection against the Proceedings of some for the promoting of Reformation of Manners, that private Informations have been taken against Criminals upon the Statutes against Profaneness and Debauchery ; which many have thought to be an unreasonable Method : It hath been judg'd fit to examine that Matter ; which is here done in brief, for the Vindication of such Proceedings in our present Circumstances ; and it is hop'd, it may be for the Satisfaction of such as wish well to the Suppression of those Immoralities ; and to the stopping the Mouths of others, who have shewn themselves too averse thereunto.*



Whether it is always just and necessary, in Order to the Conviction and Punishment of an Offender, upon the Statutes against Prophaness and Debauchery, that the Informant or Witnesses should be made known to him, or give Evidence and Testimony of his Crime to the Magistrate, before his Face?

IN Order to the laying a Foundation for the Decision of this Case, it may be of some Use to premise the Consideration of these three things, *viz.*

I. Of the End and Use of the Law, and of the Penalties annex thereunto.

II. Of Informants and Witnesses.

III. Of the Reason and End of the Witnesses giving Testimony or Evidence of the Crime before the Offender's Face, or in his Presence. By Application of these things considered together, we shall come the better to a Determination, whether it is necessary in all Cases that it should be so, or no.

2 Of Witnessing against Offenders

I. *Of the Use and End of the Law, and of the Penalties annex'd thereunto.* Law is an Act of Government, and the End of it is to be a Rule of Life to the Subjects of it, requiring them to do those things that may be for the publick Benefit and Weal, and to avoid such things as may be pernicious and hurtful to it : And there is an *Obligation* upon the Subjects to observe the same : And according to the greater or less apparent *Usefulness* of such Laws, there is the more or less Reason to act according to that *Obligation*.

And that the Subjects of every Government may be brought to observe the Laws, ought to be the Care of every such Government ; and all convenient *Methods* should be taken to enforce such Observations. And therefore because many Men are apt to be self-will'd, and not ready to submit to Restraints, that are contrary to their particular Interests, Humours, or Inclinations ; it hath been always thought needful, that something should be done in Governments to incline and engage the Wills of the Subjects to comply with such things as are commanded, and to forbear those that are forbidden. *Penal Sanctions* are annex't to Laws to this End, as the most proper Means to engage obstinate and self-

self-will'd Men to the Observation thereof, by striking something more or less of Terroure into them, by representing some Evil which they must expect to undergo, if they will dare to transgress.

And that the Subjects Obedience may be held in at least thereby, these *Penal Sacti-
ons* must not be meer *Bruta Fulmina*, but it is necessary that they be put in effectual Execution, for a Terroure to Criminals, and in *Præcautionem malorum in futurum*, that they learn by such Suffering to offend no more. And it is highly prudent for a Government to take all such useful *Methods* as are proper and behoveful for the Execution of such Penalties, in order to their having the due Effect, as may most and best answer the Design of the Law; that for want of such Execution it may not be evacuated or enervated for the time to come, as without Execution it will be; and then will be despoil'd of its End, which is the Reformation of Offenders, and the stopping of future Transgressions; and will be rather had in Contempt and Scorn, and trampled upon.

II. *The End and Use of Informants and Witnesses*, is to discover the ill Manners and Misdemeanours of Delinquents against the Laws, whereby the publick Weal comes

4 Of *Witnessing* against Offenders

to be some way endanger'd or damag'd ; and to bring in *Evidence* against them, that they may be brought to condign *Punishment*, according to the Sanction of the Laws, in order to *their Amendment*, or the *Determent of others* from doing the like ; which without this *Information* ordinarily cannot be obtain'd. The *Information* and Testimony of *Witnesses* is a necessary Means for the Execution of the Laws, which without their Assistance would for the most part be dead, and of no Force ; and the Benefit whereof would be in a manner lost : Because nothing imboldens bad Men to transgress more than Impunity, and no Punishment can be regularly executed, where there is not *Discovery*, and *Testimony* given of a Crime ; which therefore all that wish well to a Government should be assistant in doing.

And such *Informations* and Testimonies ought certainly to be used in *such a Manner*, as may most tend to the Execution of the Laws, without doing wrong. And it is of great Moment to have *Informants* and Witnesses encouraged to give in their *Informations* of Crimes committed against good and wholesome Laws, and that in *such a Way* too, as may most answer the End of their *Information*, which is the Execution

ecution of the Laws, for the preventing the like Crimes for the future. And this is the more to be regarded especially with respect to *such Laws*, as are most for the promoting of Virtue, and a good and regular Life among Men : And *those Means* and Methods of *Reformation* should be used as may be most proper and effectual, to discover and punish Transgressors, that the Honour of good Laws may be maintain'd, and the Government preserved in Order and Peace.

III. *As for the Reason and End of Witnesses or Informants giving Testimony or Evidence of the Crimes committed, before the Offender's Face*, it is only for the Prevention of false or *wrongful Accusations*, when there may be Danger thereof. It being suppos'd that Persons are generally more afraid to to be guilty thereof before others, when they are able to speak for themselves, and confront Accusers *to their Faces* : And hereby in such Cases, where there may be Danger of *false Information*, the Magistrate may be the better able to sift out the Truth, and so may be more secured in the just Execution of Laws. And certainly all the Care that can be, ought to be taken in such a dangerous Case, that no one
be

6 Of Witnessing against Offenders

be punisht upon false Accusation ; and to that End, this Method is highly useful to be observ'd, where there is just Cause of Suspicion, that otherwise there may be wrong done.

Now then to apply what hath been thus premised. First, in the general,

Where the Publick Way of Information *Face to Face*, or the *Discovery* of the Witnesses may be no considerable *Hinderance* or Obstruction to the Execution of good and wholesome Laws ; and there would be considerable *Danger* of executing wrong Judgment by the *Omission* thereof ; as it would commonly be apt to be in Cases of *Murm* and *Tuum* between Man and Man, wherein most Men are apt to be partial to their own Side : And so, when the Crimes are *secret* and obscure, and it requires much sifting and scrutiny to discover the Truth ; and when there may be just Cause of Suspicion of a *malicious Design* in the Information ; and when the *Damage* would be very great if wrong Judgment be executed, and there be nothing to *over-balance* the Hazard thereof ; in *these Cases* it is necessary that all the Solemnities of judicial Procedure should be observ'd, and *This* amongst the Rest.

But

But then on the other Side, *where* it is evident and plain that by too nice an Observation of such a Method, the *Execution* of wholesome Laws would be mightily *obstructed*, and the *Intent* of the Law thereby *defeated*, which is of great Use to the Common-Wealth; and *Crimes* by that Means are like to be *perpetuated*, for Want of Execution of the Penalties; *there* this Way of Procedure is so far from being necessary, that it would be hurtful. And if the private and *conceal'd* Way of Information will better answer the *End* of the Law, and there be no apparent *Danger* of doing wrong Judgment thereby; but the *Magistrates Conscience* ordinarily may be as secure in the Execution of the Penalties; and the Penalties themselves are *small*; and the Conveniences from the righteous and common Execution of the Laws do *overbalance* the Danger of any little or particular Wrong; *in these Cases*, the Way of *publick* Information of Crimes would be far from being necessary or useful: And considering the Conveniences and Advantages that would come by the Execution of the Laws, by the *private* and *conceal'd* Way of Information, more than by the *publick*, the *private* Way of Procedure therein is much more Eligible. And the primary *Intent* of
the

8 Of Witnessing against Offenders

the Law ought to over-rule a particular *Method* of Execution ; and no such Way or *Means* for the same ought in Reason to be urg'd, that would be a Prejudice or Hindrance to the *End* ; and when the same *End* may be obtain'd better in another *Way* : for that would be to disappoint and destroy the *End* by the *Means*, and to make the *Method* of Execution to defeat it self ; whereas the *Means* ought always to subserve the *End*, and those *Means* should be always chosen which most and best do so.

And now that I may apply these things more particularly , I shall observe,

1. That it is very apparent in some Cases, that *some Laws, which are exceedingly for the publick Good and Benefit, by the Suppression of many Immoralities and Vices* (which highly tend to the Dishonour of Almighty God, and provoke and call down his Judgments upon us, and promote Infection and Corruption in the World more and more, and have a plain and certain Tendency to the Disturbance of the publick Peace and Order) *will be of little Use to the Ends for which they are intended, if this publick Way of Information must be always taken ;* because the Execution of the Laws will be so very much defeated thereby : And so the *Means* will

will be no *Means* to the *End* design'd, but will rather be an *Obstruction* to the obtaining thereof, which is contrary to the Nature of *any Means*. This will evidently be the Case in Informations against *Prophane Swearing, Cursing, Drunkenness, Sabbath-breaking*; which yet are Vices of a very notorious and pernicious Nature, and are apt to produce dismal Effects, at least at long run, if a Reformation from them be not procur'd in time, in any Government.

For these *Vices*, through the corrupt Inclination of Men thereunto, and the Commonness of them thence ensuing, are rather esteem'd, and look'd upon as a kind of laudable and *fashionable Practices*, by Men of corrupt Minds, than to contain any great Matter of Harm or Evil in them. And thence they are apt to conceive a great *Indignation* against those, that from another Sense of things, and from a deep Apprehension of these Wickednesses, are concern'd to suppress them, by the Execution of those wholesome Laws, that are provided against them. And by reason of the Corruption of Manners so much prevailing amongst the Generality of Persons, there are more that are apt to take Part with the *Criminals*, than with the *Informants* against them; whose zealous and
pious

10 Of Witnessing against Offenders

pious Intentions and Prosecutions are for the most Part censur'd for hard and *uncharitable Dealing* with their Neighbours ; and are look't upon as giving a needless Trouble to a Place, in which commonly there are so many Persons involv'd in the same Guilt. And *Informants* in such Cases must needs be subject to the *ill Will*, Spight and Revenge of Abundance, and yet are like to have but little *Shelter* or Defence against their Rage and Malice.

It is plain, *informing* against these Vices is not any Man's private Interest or *worldly Concern*, in which Case Men are ready enough to appeal to the Magistrate and fetch a Warrant, nor is there any thing like it, to encourage or engage them. On the other Side, they run a manifest Hazard of *endangering* their *Private Interests*. In those Cases wherein Men are found to give Evidence publicly in all Courts, either there is some *private Concern* of their own, or there is some other *Commodity* or *Necessity* that engageth them to it. Sometimes they are *obliged* to prosecute Offenders, and are *bound over* to do it, if it be known, that they have Notice of their Crimes, and are able to give Evidence against them ; and therefore they cannot help it : Or they may be *subpœna'd*, and forc'd

forc'd to tell upon Oath what they know. Sometimes there is a *Penalty* upon them, if they do conceal the Crimes, or Plots and Treasons of Men. Sometimes there are *Rewards* propos'd to engage them to the Discovery : Or lastly, in some Cases there may be the *publick Weal* so immediately concern'd in the common Apprehension of all Men, that ~~that~~ may be sufficient to excite them to do their Duty.

But in these Cases of *Debauchery* and *Prophaneness* there is none of all this, but rather the quite contrary. Here are no *Rewards* for Discovery ; no *Penalties* for concealing. And if we know that Persons can give Evidence of the Immoralities committed, and do even brag of their Knowledge thereof, there is ordinarily no forcing them to inform, nor are they *bound over* to prosecute ; and most are apt to discourage them and divert them from it. Let a Man's Ends therein be never so honest, and pious, and charitable, yet what he doth shall be censured to proceed from Pride, Self-conceitedness, busy Bodiness, or some spiteful and ill-natur'd Principle or other. And he shall be made the Mark of every one to shoot the malevolent Darts of an evil Tongue against him, if he be known ; and it is well sometimes if he goes
off

12 Of Witnessing against Offenders

off so, and be not expos'd to the *Rage* of the Rabble, and meet with more real Dangers and hard Usage ; the Number of Criminals being so great, and such Sins and Sinners had in *Vogue* and Credit ; and the Name of *Informer* upon these Accounts infamous to the *Mob*. These are not only *Fictions* and *Chimera's* ; but we can name the Places *where*, and the Persons *who* have suffer'd very much by these Means, and that upon a bare Suspicion of their being engag'd in this Way ; many desperate Wretches threaten to knock out their Brains, if they knew them, for doing them such a charitable Office, as to stop them in their Career to Sin and Hell. And some have suffer'd very considerable Damages upon this Account from their revengeful Neighbours. And therefore we find it difficult to get Men even in the most *private* Way to bring in their Informations, for Fear of *losing* their Trade, Friends, good Will of their Relations, or those about them. And let any one try, how much more difficult it would be, to get all the Business publickly manag'd. Men will not ordinarily expose themselves to the Rage and Malice of others, in doing Offices, which they are not absolutely forc'd to, and have no Advantage by ; but may expect rather, that
so

so many will fall foul upon them for. In other Cases, where their own *Persons* or *Properties* are in Danger, or where they apprehend the *Publick* to be like to suffer immediately, they will (it is likely) for their own and the common Good, be more active and forward to discover Offenders. Traitors, Felons of all Sorts, Murderers, Robbers, Thieves, House-Breakers, Cut-Purses, and all fraudulent Dealers, are therefore look'd upon with an evil Eye by most, and there are few to take their Parts. But in Vices and Debaucheries committed *against God* and his Honour, and which are thought only to carry in them some remote Mischief, how few care to concern themselves? even *Officers, Constables, Church-Wardens* who are under the Obligation of an Oath, to inform the Magistrate, and to bring Men to condign Punishment for such evil and disorderly Practices; though we have so many pious and excellent *Laws, Proclamations, Sessions-Orders* to encourage and back them; and though they have been earnestly urg'd to it by many *Magistrates* and *Ministers* privately and publickly; have yet *done little*; alas! very little this Way: Not either the *Conscience* of their own Guilt of the same Crimes have withheld them; or for Want of Christian Zeal

14 *Of Witnessing against Offenders*
and Courage, and of a Sense of Duty
which they owe to God, and their Neigh-
bour, and the Laws of the Realm; they
have been *afraid* or *asham'd* publickly to
appear or shew themselves; or because
they have thought it would *prejudice* their
Interest. And how shall *others* that have
no such *special Obligations* from Place or
Office, to bear them out in it, and when
they lie under so many *Disadvantages* be-
sides, *put* themselves on to such a dange-
rous and ungrateful Trouble?

And besides all this, the *Conviction* of the
Offender in this *publick* Way, would in
many Cases *cost* the *Informer* and *Constable*
as much as the *Penalty* amounts to on the
Offender, and sometimes double and triple
as much: Besides the additional Fatigue
that would be in this Case, would make
the Execution of the Law impracticable.
If a Warrant must first be issued out by the
Magistrate to a Constable dwelling divers
Miles from him to bring a Criminal before
him, upon an Information given, and then
he must convict the Offender upon another
Appearance of the Informant, to make In-
formation *before the Face* of the Criminal;
and must afterwards issue *it* another
Warrant for the inflicting of the *Penalty*.
(suppose *two Shillings* for Prophan Swear-
ing)

ing) The Charge, Fatigue, and Trouble of this Procedure, both to the Magistrate, the Informant and the Officer, will be enough to hinder all Judicial Proceeding and Execution, in Cases of such odious Esteem; and where the Facts are also so common, and so few have the Zeal to concern themselves about them.

From all these Things it seems very plain that the *Way* by some insisted upon, for the Conviction and Punishment of Offenders for these Crimes, by *publick* Information, *Discovery* of the Informants or bringing them *Face to Face*, is, as things now stand, really *impossible*; and is so far from being *useful*, that it would upon many Accounts be most *mischievous* and hurtful. And thereupon it hath been found by long Experience, that the *Laws* against these Vices and Immoralities have not obtain'd the *Effect* for which they were intended; but the *Execution* of them formerly was in a Manner wholly *frustrated*, as if they had never been. And perhaps in several Scores of Years past, in all the Counties of *England*, there hath been rarely any *one Conviction* of any *one Criminal* upon those Statutes against Prophaneness and Debauchery, unless upon View or hearing of the Magistrate, or by Informations made out

16 Of Witnessing against Offenders

pique

of ~~Pick~~ after some Quarrel ; till Convictions have been made by a *Concealment* of the Informants. But by this Means more hath been done in the Execution of these wholesome and good Laws, within a few Years past, than was, it may be, for a hundred Years before : And in this degenerate and corrupt Age, we conceive little Hopes of any thing being done considerable in any other Way : So that, for what we see, *this Way* must be taken or *none*, if we would have the Laws executed to the Ends for which they were intended : And they that have an honest Desire of the Execution of the Laws should do well to consider of it.

2. But if it be said, that *there is more Danger of doing wrong by this Way of Information, than by that which is publick and open* ; and therefore that the publick Way of Information, though it be not so apt and useful to the Execution of the Law, yet is needful to be continued, and we must be contented with it, such as it is ; for the avoiding of wrong Judgment, and for the greater Security of the Magistrates Conscience in doing of Right : I answer, *That this is precariously said in those Cases, which we are now discoursing of, and it is a wrong Representation of the Matter.*

For,

For, as for what concerns the *Magistrate*, he living in the same Neighbourhood, may either himself *know*, or may easily *inform* himself by others (especially by the *Ministers*, by whom these *Informants* are desired to give in their Evidence of such Facts, and from whom they are frequently sent to him) of the Probity, good Life, and Manners of such Accusers; whereby he may be morally secure of doing Right, and not like to be imposed upon so much this Way, as by *Strangers* that he hath no Knowledge or Account of, or by *Persons of ill Lives* and Manners, though they should offer to deliver in their Evidence never so boldly *Face to Face*. But if the Magistrate by himself, or by the Information of the Ministers, hath any just Cause of Suspicion of any design'd Malice in the Witnesses, or hath not a morally certain Knowledge of their Probity and honest Intentions; he may then prudently *oblige* them to a publick Information, or *deny* the Acceptance of what they offer in a private Way. This we suppose should be done, and wish always to be done in such suspected Cases, and then there is no Danger.

But there is really no more Danger ordinarily to the accused Person, in these

18 *Of Witnessing against Offenders*

Cases, of suffering wrong by this *private* Way of Information, than there is by the *publick*. For it is not probable that Men should forswear themselves in Matters of a Nature which do not concern either their own or other Mens Properties or Commodities, but only dishonour and provoke Almighty God, and injure the Commonwealth consequently and more remotely; especially where the Penalty upon the Offender is but small, and there is no Encouragement of any Reward, but the quite contrary, for such Informations. It is not likely that Men would proceed ordinarily to a malicious false Accusation in such Cases: For Malice and Spight are apt to be of a more outrageous Nature, and are bent upon doing greater Mischiefs. Nor can such malicious false Informations be suppos'd to be made, but by very bad and profligate Persons, that are commonly guilty of the same Crimes themselves; and think them hardly to contain in them any Manner of Infamy; and when their Information will be a Testimony to their Consciences against themselves. But if this should be suppos'd, yet the appearing *Face to Face* can by no Means secure the Innocent against a false Witness, if he hath a malicious Design to injure another by a false

false Information, and hath so much Boldness to attempt it : For if any be so wicked as to accuse another falsely, though the accused Person be present and denies the Fact, yet is the Magistrate oblig'd to convict him ; and the Denial of the accused Person will be no more Advantage to him, when present, than if he were not so. And if he can prove his Innocence, he may right himself by the Prosecution of the false Witness, and so all Right may be done him, for upon Evidence or vehement Suspicion of Wrong done, and upon Complaint made of the same, and an Engagement to prosecute, the Magistrate will discover the *malicious perjurd Accuser*, and help to prosecute him ; and we always desire that he would do so. And the Accused, if innocent (upon the Proof of his Innocence) hath *this Way* as easy a Remedy for his Vindication as *the other* ; seeing the Magistrate is bound to take the Oath of the Accuser, when he offers it.

And I may say further, that *the Way* that is taken by us, doth more tend to the preventing false Accusations, than *the other*. Because the Persons encourag'd to make these Informations are known to the *Ministers*, or other discreet Members of the *Societies for Reformation of Manners*, who

20 *Of Witnessing against Offenders*

think them Persons of Probity and Sincerity, and to act from Principles of Conscience towards God and Man; and are careful also to *præexamine* them about the Facts committed, and take all Care to *prevent* any Information, that may but seem to proceed from any sinister Intention, Spight and ill Will, upon any Quarrel or Defence that may accidentally have arisen.

And *where* there is no Evidence or just Suspicion of false Accusation, there we think there is no Reason to make the Witness known, because there is *no good Use* can be made of it, nor any *wrong done* by the omitting of it to any Person whatsoever. In short, if the **Accused** be guilty, there is no Wrong done him by a *private* Information; if he be not guilty, there is Wrong done him indeed, and so there would be the same, if it were done in a more *publick* Way: And upon such reasonable Plea and Appearance of his Innocence, such a malicious *private* Information may and will by the prudent Magistrate be *made publick*; and then there is the same Remedy in the *one*, as the *other*, and not one jot more.

Supposing there may be Mischiefs done in the *private Informations*, so there may be in the *publick* too; and some Inconveniences there are in all Humane Laws, and Ways of Procedure; as may be observ'd
in

in the Trials by *Jurys* themselves in the most weighty Cases: And yet such *accidental Inconveniences* are no just Argument against the Use of *Jurys*, and Convictions and Trials made by them: And why should an *accidental Inconvenience* or Mischief arising in *another Way*, be urged to the relinquishing thereof; especially considering, how such particular Mischief or *Inconvenience* emerging is so *overbalanc'd* by so many other *Commodities* and Advantages, which are not to be found in the publick Way of Proceeding, where yet there may fall out the same Mischief?

All these things being thus consider'd, and the Magistrate's Conscience being secur'd in the Execution of the Laws, and there being no just Apprehension of Danger of a wrongful Infliction more this Way than the other. And the Laws by this Means being likely to have their Course, to the great Advantage of the publick, by the open and visible Restraint of these scandalous Enormities, which otherwise for Want of Legal Executions are like to continue still without Controul; we think it abundantly better that the Execution of the Laws should be promoted in this Method (in which it is only likely to be to any good Effect, according to the just and honest

22 *Of Witnessing against Offenders*

honest Design of the Laws) though with the Omission of the common Solemnities of Procedure in some other judicial Cases; than that the Execution of such wholesome and good Laws should be utterly defeated, as it plainly will, by the more open and visible Process.

I come now to the Objections and Arguments to the contrary.

Obj. 1. It is said, that *it useth to be so in all other Cases, that Informations are only publickly given and accepted, and therefore it ought to be so in the Matter before us.* I answer, the Cases are not alike: Because, first, there is a greater Difficulty to bring Accusers to make their publick Informations in these, than in all other Cases. There is no *Inducement* for Witnesses to inform (distinct from a Sense of Duty) in these, as there are in all other Cases; but instead thereof a great Deal of *Discouragement*, as was shewn before. And therefore *Informants* in these Cases have need to be more *Indulg'd*, and so better *screen'd* and *protected*, than they can be in the publick Way of Information.

And then moreover there is a great Deal of Difference in Respect of the *Penalty* to be executed, which in these Cases is exceeding *small*, and disproportionable to the Offence,

Offence, and doth not restrain Men from the open and barefac'd Commissions; whereas in other Cases they are so great, as to be sufficient to oblige the Criminal to use the utmost Caution to conceal his Offence from all manner of Notice; but the Penalty for *Swearing, &c.* is not sufficient to frighten Multitudes from committing the Sin in all Companies, and in the Presence of a whole Market. The Secrecy therefore of other Crimes, occasion'd by the Caution to conceal them, renders it necessary to have Accusers examin'd *before* the Offender; it being so hard a thing to sift out Works of Darkness. And if the Penalty for these Sins were but sufficient to deter Men from sinning *openly*, we should likewise think it convenient that the Conviction should be *open*.

Now it is but Reason that the Nature and Manner of Trials, Convictions, and Judgments, should be adjusted to the different Nature and Weight of the Causes, that are to be try'd and examin'd: So that *less* and fewer Solemnities may well be requir'd in the *lesser*, whereas the *greater* will require *more*; for there is no need, that there should be *par processus* where there is not *par Ratio*, but there may be very well an unlike Proceeding, where the Cases are unlike.

24 *Of Witnessing against Offenders*

unlike. Justice being the great Prop and Support of Society ought indeed to be maintain'd ; and therefore the Wisdom and Interest of all civiliz'd Nations have led them to guard and defend it ; and to that End they have appointed certain *Methods, Forms, and Rules* to be observ'd in the Administration thereof ; but those being *humane* and prudential, have always been look'd upon as *variable* and alterable Constitutions ; and may be chang'd as the Circumstances of Time, Place, and Facts do require. In more difficult and weighty Cases, and where the Penalties are great, all *preliminary Cautions* are to be us'd, all *Solemnities* of Conviction and Judgment are reasonably to be observ'd, to prevent the Effects of a mistaken Ignorance, or of Malice and Revenge which the Corruption of Men doth often incline them to against those they hate, and when they can find Ways to discover the same to Purpose ; and because where the Penalties are great, the Damage to the injured Person will be so very grievous. But in *lesser Cases*, it hath not seem'd needful to be so very nice and solemn ; but it is thought fit to secure the Course of Justice, as far as may be reasonably expected, without such Solemnities ; which would but retard or obstruct the
the

the Execution of Justice ; the Effects of which, tho' even in lesser Cases, yet at long Run may be exceeding dangerous.

If it be said, that *Right* ought to be done in *little*, as well as in *great* Causes ; I grant it. And for what I see, *Right* may be done in the Cases we are upon, and in such Circumstances, though the Solemnities of publick Procedure should be omitted. And no Government ever thought that in all Cases the *same* Procedure should be observ'd.

And therefore in the *Act* against profane Swearing and Cursing, the Necessity of having *two Witnesses* for Information of those Crimes is taken off (which in this Case formerly, and in other Cases is still required) that the Execution of this *Act* might more easily proceed ; and why then may not the Solemnity of a publick Information by a Parity of Reason be omitted for the same End, in these smaller Inflictions, when the Magistrate may have otherwise a moral Certainty of the Crimes committed ?

And thus also in these Cases, the Law alloweth the Conviction and Punishment to be by *one single Magistrate*, when in other more weighty or dangerous Cases, more are required ; and all this in Order to the more easy Dispatch of the Execution ;

26 Of Witnessing against Offenders

on ; and why should it not be left to the Prudence of the Magistrate to proceed by private Information too in these smaller Cases, in Order to the like Dispatch ?

And we have heard in some Cases that Persons have been committed to Jail, even upon the private Information of others, and oftentimes upon meer Suspicion of Crimes ; where they are expos'd to some Charge, and suffer some Durance much exceeding the smaller Penalties for the promoting of Reformation ? It may be said perhaps, that those are not properly Punishments, which precede Convictions : But they are certainly equivalent, and much exceeding the Punishments that are inflicted in these Cases.

But it may be, after all this, it will be said, that the Penalty for prophane Swearing and Cursing, is not so little or light, as is represented ; for though it be but a small Matter in it self, yet the Record afterwards doth aggravate the Penalty. And the Evil that comes by Mis-information, if any such should be, is very great, because the Injury done to any Person thereby is irremediable ; the Crime of which he is wrongfully convicted being to remain upon Record to his Disreputation for ever. To which I answer, not only, as was observ'd

serv'd before, that there seems no *more* Danger of wilful Mis-information in this *private* Way of Conviction, than in the *other*, which is *Face to Face*; nor so *much*, as things are manag'd by the *Societies for Reformation of Manners*, but more particularly,

1. Suppose the *Penalty* never so much augmented by the *Record*, it is plain, it is *comparatively little*, even in the Sense of the Criminals, and therefore doth not restrain Men, even from the *open* committing of these Sins, as was said before, these Vices being hardly thought by many to carry any *Infamy* with them, on the Account of which they much value the *Record*. Whereas in *Petty-Larcenies, &c.* where are smaller Penalties, yet because of the *common Infamy* of such Practices, Criminals are very cautious to conceal their Offences from publick Notice.

2. The Evil and Injury which is objected from the *Record* made of the Crime, doth not arise from the Nature or Way of *private* Information, more than from *the other*; but is alike incident to any Conviction, that is made either Way. And if there be a Conviction upon a wrong or false Accusation or Information in the *publick* Way, there is the same Evil or Inconvenience

28 *Of Witnessing against Offenders*

venience arising ; and no more by what is done in *private* than in a *publick* Way. So that if any such *Evil* do arise, it must be imputed to the *Law* it self, or some Defect therein, that doth not provide for the remedying thereof, and not to the *private* Way of Information by it self considered.

3. But if after Conviction of such a Crime, it doth appear to the Magistrate, that there is Wrong done by Mis-information, we doubt not but such Magistrate may forbear entring such a Conviction upon *Record* ; or if upon Suit or Trial such Person be discharg'd from the Imputation and Guilt of such Crime, that then such Conviction, if recorded, may and ought to be expunged and obliterated out of the said *Record* : Or however a *Record* of his Innocency upon Trial, will be a clear Recovery and Vindication of his Reputation again.

Upon the whole there appears no Reason to depart from the *private* Way of Information, which is so useful to the more effectual Execution of these Laws, for *Fear* of such unforeseen and uncertain Inconveniences following. For if that be a sufficient Reason or Bar against the Execution of the Laws *this* Way, then if the same be likely to follow the *other* Way, as it may possibly

possibly do, then it ought to be a Bar to the Execution *that* Way too ; and then the Law should be executed no Way at all ; which is absurd, and to make the Law ridiculous.

Obj. 2. It may perhaps be further objected, that *it is against Scripture, and the Law of God and Nature, and even common Reason it self, to have Accusations accepted, Convictions and Judgments carried on in this clandestine Manner, where the accused Person hath not the Opportunity to plead for himself against and in the Presence of the Informant.* And therefore *Nicodemus* said, when the Jews brought their Accusations against Christ, *John 7. 51. Doth our Law judge any Man before it hear him ?* And so by the Light of Nature *Festus* tells them, *Acts 25. 16. It is not the Manner of the Romans to deliver any Man to die, before that he that is accused, have the Accusers Face to Face, and have Licence to answer for himself, concerning the Crime laid against him.*

I answer, Both these Instances are only in *Capital Cases*, wherein it is allow'd, and was insisted upon before, that all Manner of *Cautiō* and *Solemnity* of Proceeding ought to be observ'd. The Jews hunted after our Saviour's Life, and for that Purpose sent Officers to apprehend him, and

E

were

30 Of Witnessing against Offenders

were resolv'd to compass his Death right or wrong, which was barbarous Injustice; and were ready to censure and condemn him by mere Hear-say : To which *Nicodemus* here justly oppos'd, as being a Case that required more exact and cautious Dealing.

So it was a *Capital Crime* against the State, that *Festus* thought *St. Paul* was accused of ; in which Case it was fit to have the most Solemn Procedure, because it was for Life, which is a Matter of the highest Consequence above all other. But where the Penalty is small, and the *Emendation* or *Reformation* of the Offender is only respected, and not his *Execution* or *Destruction*, there doth not need the same Deliberation, and Formality of Proceeding ; provided that some Way or other there may be a *moral Certainty* of the Fact committed, which is the Ground of such punitive but yet *emendatory Judgment*.

And thus *St. Paul* only tells the *Corinthians*, 2 *Cor.* 5. 1. *It is reported commonly that there is Fornication amongst you, &c.* He doth not tell, whom he heard it from, nor produce the Names of the Witnesses ; but being well assur'd of the Fact, by the Report of some whom he could trust ; He saith 2. 3. *I verily as absent in Body, but present in*

in Spirit, have judg'd already, as though I were present, concerning him that hath done this Deed ; and orders them v. 5. To deliver such a one to Satan for the Destruction of the Flesh, &c. There being sufficient Evidence of the Fact to the Apostle's Satisfaction, there needed no farther Solemnity of Trial.

Thus having *secret Informations* of Crimes committed, and having Confidence in the Veracity of those, that have inform'd us thereof, we do often very *sharply* (yet justly) *reprove* an Offender, and sometimes before others to bring him to Shame and Repentance; and yet upon divers good Considerations don't think our selves oblig'd always to let him know who his Accusers are ; for as much as all that is done is only intended for his *Reformation* and Good. And the Execution of the Penalties, in the Cases we are upon, is for the same End, and doth hardly exceed the Sharpness of a just Reproof.

In all great and weighty Cases, it was one of the judicial Laws given to the *Jews*, that *two Witnesses* were required for the Conviction of any Person. Of *Murderers*, *Numb. 35. 30.* it was so, of any one that *was worthy of Death*, *Dent. 17. 6.* Thus *he that despised Moses's Law died without*

32 Of Witnessing against Offenders

Mercy under two or three Witnesses, Heb. 10. 28. It is exprest more generally, *Dent.* 19. 15. Yet comparing it with v. 21. it appears to respect such Crimes, wherein the Penalty to be inflicted, was to be, either Loss of *Life*, or the Loss of *an Eye*, *a Tooth*, *a Hand*, or *Foot*, the Loss of which was grievous, and next to the Loss of *Life it self*.

But in lesser Cases and Penalties, I find no Rule in Scripture concerning this Matter, even in the judicial Law of *Moses*; but only that every one must take care not to be an *unrighteous Witness*, *Exod.* 23. 1. Except in Case of such great Penalties, there is no stated Rule, whether there should be three or two or *one Witness* only; or whether they shall witness *Face to Face*, or no. And therefore, notwithstanding all those fore-mention'd Passages, concerning *two or three Witnesses* requir'd in Judgment, yet in the *Act against Prophan Swearing and Cursing*, it is thought fit to require but *one Witness*, and so in other *Acts*, in Order to the better and more *ready Execution* of the Laws: And this no Body finds Fault with, that the *Law* might have its free Course. And why then for the same Reason should not the *Appearance* of the Witness before the Offender's *Face* be likewise remitted,

or left to the Discretion of the Magistrate, in Order to the better Execution of the Law, which would not only be *retarded*, but even *vacated* and nullify'd the other Way, provided that the *Magistrate* be *this Way satisfy'd* of the Validity of the Testimony given.

In a Word, neither the *Law of Nature*, nor *positive Law* of God require more, than only that *Justice* be done, and that no Man be *wrong'd* or injur'd by unjust Punishments or Inflictions; but doth no Way determine the *particular Course* or Manner, how in all Cases Justice is to be executed; but leaves the *particular Methods* thereof to the prudential Determination of *Governours* to be stated by them according to the *different Exigency* and Weight of the Cases in Dispute. And therefore *different Methods* or Modes of Administration, in different Cases, are or may be used, as they are most behoveful to the *same End* of the Execution of Justice, for the Restraint of Vice and Immorality, and are *severally* useful to that End.

If it be still objected, that it is a very unnatural thing and unreasonable in it self, to condemn a Man unheard, before it be known, what he can plead for himself, and that it raseth the Foundation of all judi-

34 *Of Witnessing against Offenders*

cial Proceeding, and is contrary to all Equity. To this I answer, it is indeed contrary to Equity and Justice, to condemn a Man for a Fact, that hath not been committed by him, or not with such Circumstances, as the Accusation may contain, or of which there is not sufficient Evidence; but if there be sufficient Evidence, that he hath committed the Fact, then there is no Injustice to censure him for it thus far. And it is only in Order to come to a Certainty of the Fact committed by him, that it seems reasonable to hear what he can say in his own Justification. But if there be a sufficient Evidence and Certainty of his committing the Fact, without hearing his Plea in his own Behalf, it is not in it self unreasonable to condemn him unheard. And, I think, it appears by what hath been said, in our Way of Proceeding in these Cases of Debauchery and Profaneness, that there may be a sufficient moral Certainty of the Fact committed by him, though the Examination of the Witness before his Face, and his Liberty to answer for himself be precluded. We dont extend this to other Cases of a more difficult Nature, and where the Circumstances are to be consider'd, as well as the Fact it self, but only to these before us, of which in
the

the Way insisted upon there may a sufficient moral Certainty be obtain'd ; which we are sensible cannot so well be in others, or not as they are cloath'd with their proper Circumstances, which many Times alter the Nature of a Thing. And therefore, though what is urg'd, is to be granted to be the most reasonable Way of judicial Proceeding in other Cases, yet in what now we are upon, there is not the same Necessity for it, and therefore not the same Reason.

If it be said, that however there may be a greater Degree of Certainty of the Fact committed, when the accused Person is heard plead for himself, and the Witness will be under a greater Awe and Dread of giving a false Testimony. And we should always do that which is safest, and most remote from all Danger of Injustice. To this I answer, so there will be a much greater Awe upon the Witness in delivering his Testimony, and a greater Degree of Certainty of the Fact, if the Accusation be made not only before the Face of the accused Person, but also before a whole Bench of Justices and Judges, than there will be, if it be only made before one ; and moreover, if it be done also before a Jury, and in the Face

36 *Of Witnessing against Offenders*

of the Country ; and so if there be two or more Witnesses to attest the Fact, than if there were but one. And if in all judicial Proceedings the greatest and the highest Degree of Safety in taking the Evidence must always be observ'd, then there must be always two or more Witnesses, and there must be a Jury impanelled for the Trial of every such Fact, and the Trial must be before a whole Bench of Judges too : Neither of which, we know, in these Cases is required ; one Witness only, and one Magistrate being thought sufficient, and that without any Jury at all ; though it is manifest, that in this Way there is a lower Degree of Evidence than what *might* be. And if one Magistrate, and one Witness, without a Jury be sufficient to convict the accused Person, though upon a less and lower Degree of Evidence and Certainty, than what *might* be ; then it is plain that the highest Degree of Evidence and Certainty is not always necessary, but a less may sometimes be admitted. And it may well seem abundantly sufficient to admit of such a Degree of moral Certainty and Evidence, as there may be no reasonable Cause in such Circumstances to doubt of, as may most tend to the Execution of the Laws in these Cases, though it doth not amount to
the

the highest of all. And if because there may be a moral Certainty, though not the highest, by a Conviction made by one Witness, and before one Magistrate, therefore that Way of Proceeding in these Cases is thought sufficient; then likewise if there may be a moral Certainty by a private Information in our Way of Proceeding; which we think there may be in a competent Degree, why should not that be thought sufficient also, though it be not the highest. A lower Degree of Certainty in a lesser Case may as well suffice as an higher Degree in a greater.

Obj. 3. After all, it is further said, that though by the foregoing Discourse it may seem reasonable in it self, that there should be an Abatement and Remission of the usual Solemnities, in the Cases about which our Dispute is, so that no Man's Conscience is under an Obligation to observe the same, abstractedly from *the Law of the Land*, yet, *if the Statute or common Law and Custom of this Nation be otherwise, that all Informants and Witnesses should give in their Evidence against the Criminals before their Faces, then are we bound to it*; and this also becomes an Ingredient in the Case, because all Judgment ought to proceed *secundum Leges & Consuetudinem Anglie*. And so it
is

38 *Of Witnessing against Offenders*
is in vain to go about to separate the Case
of Conscience from the Point of Law.

To this I answer,

1. That it doth not appear that there is
any *Law* or *Custom* extant, that is univer-
sally obligatory in all Cases to the strict and
constant Observance of what is insisted on.
That it is necessary and required in other
Cases, may be allowed; but unless like-
wise it doth *particularly appear in this*, or
unless this Case, did *appear like other Cases*
(as it doth not) then a Necessity in *other*
Cases is no Argument for a Necessity in
this, where the Cases are unlike. And it
would make one think that there is no such
Law or *Custom* in this Case, because the
Practice is otherwise, and hath passed
without any publick Censure, that we
know of.

There is a Passage in *Magna Charta*,
which some pretend is Home to this Busi-
ness, *viz.* that all Trials are to be *per pares*
vel per Legem Terræ, 9. *Hen.* 3. 39. To the
same Purpose is the 5. *Edw.* 3. 9. and 25.
Edw. 3. 4, 5. These two Expressions some
would make to be the same, and that one
is *explicative* of the other; and that
seeing all *Trials* must be *per pares*;
that they must be *before the Face* of the
Criminal, and in the Face of the Country:
And

And that there can be no Convictions *per Legem Terræ* but what are also *per pares*. But the contrary is evident at first View, for here the Expression is *disjunctive*, and one is made a distinct thing from the other; so that *Magna Charta* by this Disjunction, supposeth that a *Law* may be made, upon good Causes and Considerations, whereby Tryals may be made, and yet not *per pares*. Therefore the *Statutes* quoted only restrain the *Executive Power* from all arbitrary Proceedings against Persons accused; and require only that they should be try'd either *per pares*, or in some other Way allow'd *per Legem Terræ*. And accordingly in several Courts, we find there are Trials *per Legem Terræ* that are not *per pares*: And indeed in these *Laws* against *Prophaneness* and *Debauchery*, the whole Trial is only *before one Justice of Peace*. And the Force of the Objection then lying here, that because Trials must be *by the Peers*, therefore there must always be publick Evidence given before them; then by those *Laws*, wherein the Trial and Judgment *by the Peers* is taken away (as in these we are now upon) the Necessity of the publick Appearance of the Evidence, is taken away also. And whoever will urge the Necessity of the Evidence publickly appearing, from this
Passage

40 Of Witnessing against Offenders

Passage, must necessarily hold, that all Trials and Judgments whatsoever must needs be by *Jurys*, which we plainly see in some Cases (as in these before us) the Law hath taken away, as was said before; and so they must quarrel with the Law it self as an Infringment of *Magna Charta*; when yet it is plain by the very Letter of *Magna Charta*, that *Magna Charta* it self alloweth such a Law.

2. And supposing there had been a *Custom* for such a Form of Proceeding heretofore, that *Informants* should deliver their Testimony before the Face of *Prophane Swearers*, &c. whom they accuse; yet it is plainly an *inconvenient Custom*, which by Degrees should be permitted to grow absolute in these Cases, and were better vacated; and the *Discovery* or *Concealing* of the Witness left to the Discretion of the Magistrate, that the *End* and Reason of the Law might better take Place, and that the Design of it might not be invalidated, by too strict and nice an Adherence thereunto. And whatever the *Custom* may be pretended to have been a great while ago, (when they can produce very few Instances of *Informations* upon these *Acts*) yet now for many Years past, it is certain, that the Manner of Procedure in this particular bath

hath been otherwise, and that with common Connivance and Consent ; which may be thought equivalent or *tantamount* to an Abrogation of such a *Custom* (if such there was) all other Ways of Proceeding (generally speaking) being unapt to answer the End of the Law, and being an Hindrance rather to the Execution thereof, as is plainly found by universal Experience ; And here the Rule holds, as well as in other Cases, *id maxime tenendum, quod effectum maxime obtineat.*

If it should be still insisted upon, that however the publick Way of Information is *better*, and Men should have Virtue and Courage to do what is *best*. I answer, That is best, which best answers the End ; which, in the Circumstances in which the World now is, is plainly the *private* and not the *publick* Way, till Men come to have more Courage openly to espouse the Interest of Virtue. 'Tis true, Men should have Courage and Zeal to do this ; and 'tis no Matter how publickly and openly Vice be run down, and Virtue encourag'd. But the Question now is, not what Men *should* have, but what they *have* ; and how at present the World will bear these things. It were indeed to be wish'd that *all Men* in their Places would *publickly shew* themselves

42 *Of Witnessing against Offenders*

selves against *all* the Immoralities and prevailing Vices of the Age; and by open Censures would endeavour to make Vice asham'd. And if all *Magistrates, Constables, Church-Wardens*, and other *Officers*, had the Courage and Honesty to do their Duty faithfully, which is incumbent upon them in this Regard, there is no Doubt, but a great deal of Good might be done. Or if Men in private Stations, out of a deep Concern for the Honour of God, and the publick Good, would ordinarily give in Evidence to Magistrates in a *publick* Way, for bringing Offenders to condign Punishment in these Cases, it would no Doubt be a great Deal better than it is. But how long shall we look for these Things? Those indeed that *inveigh* against the private Method of Information, ought above all others to lead the Way, and give a good Example in this Matter, of a more *open* and *publick* Evidence. And when we see them do so, and perceive the good Success thereof, we will promise them never more to insist upon that which is more *private*. But if they will do neither; neither bring in Informations publickly nor privately, for the suppressing these scandalous and very destructive Immoralities; no nor so much as acquaint us when or where any considerable

able Progress has been made in a Reformation of Manners in the Way they propose ; we desire they would not censure others, that from a pious and good Intention, are willing to do, what they think in Prudence they may in this Matter, till they come to have better Encouragement (than yet they have) to do more.

F I N I S.

54

1990

100

10

